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Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

CADET DONCOSTA E. SEAWELL,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a mandatory supervised release program violate the Fifth and Eighth Amendments, where the program allows the Government to revoke earned credit against an adjudged sentence without due process thereby resulting in an increase in punishment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. The United States Court of Appeals for the Armed Forces' decision conflicts with other federal courts of appeal. 7

II. Petitioner was confined longer than authorized under his approved sentence 14

CONCLUSION 16

APPENDIX 1a

TABLE OF AUTHORITIES

Constitutional Provisions

U.S. CONST. amend. V.....1,14,17
U.S. CONST. amend. VIII.....2,16,17

Supreme Court of the United States Cases

Estelle v. Gamble, 429 U.S. 97 (1976) 16
Haines v. Kerner, 404 U.S. 519 (1972).....9
Morrissey v. Brewer, 408 U.S. 478 (1972) 8,9
Screws v. United States, 325 U.S. 91 (1945) 9
Wilwording v. Swenson, 404 U.S. 539 (1974).....9
Wolff v. McDonnell, 418 U.S. 539 (1974).....
.....9,10,11,13,14

United States Court of Appeals Cases

United States v. Pena,
64 M.J. 259 (C.A.A.F. 2007) 15

Courts of Criminal Appeals

United States v. Hilt, 18 M.J. 604 (A.F.C.M.R. 1984) 16
United States v. Mansfield, 33 M.J. 972 (A.F.C.M.R. 1991) 16
United States v. Weber, 56 M.J. 736 (C.G. Ct. Crim. App. 2002).....16

Federal Circuit Courts

Block v. Potter, 631 F.2d 233 (3d Cir. 1980) 11
United States v. Copley, 978 F.2d 829 (4th Cir. 1992).....6,7,8
United States v. Stephenson, 928 F.2d 728 (6th Cir. 1991).....9,10

Federal Statutes

10 U.S.C. § 855 2,15
10 U.S.C. § 867(a)..... 1
28 U.S.C. § 1259..... 1

Miscellaneous

Air Force Instruction 31-205 11,12
Department of Defense Instruction 1325.7 .....
..... 7,8,12,14
Joint MSR Policy..... 7

The Petitioner, Cadet Doncosta E. Seawell, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on August 5, 2008.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Seawell,* 2008 CAAF Lexis (C.A.A.F. 2008) is located at Appendix (App.) 1a. The order and judgment of the United States Air Force Court of Criminal Appeals, *United States v. Seawell,* ACM 35331 (f rev), 2007 CCA Lexis 571, (A.F. Ct. Crim. App. 2007) is located at App. 2a.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces (C.A.A.F.) was entered on August 5, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (2000) and 10 U.S.C. § 867a(a) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution states in relevant part:

> No person shall be...deprived of life, liberty, or property, without due process of law.

The Eighth Amendment of the United States Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Article 55, Uniform Code of Military Justice (UCMJ), Section 855 of Title 10, United States Code [herinafter Article 55], provides:

> Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

STATEMENT OF THE CASE

This case presents the question of whether the imposition of an additional 35 days of confinement as a result of mandatory supervised release (MSR) being revoked increased Petitioner's sentence in violation of the Eighth and Fifth Amendment.

On August 12-13, 2002 and October 15-16, 2002, a military judge tried Petitioner at a general court-martial at Los Angeles Air Force Base, California for offenses which occurred after August 16, 2001. Petitioner entered a plea of guilty pursuant to a pre-trial agreement to the charge of forcible sodomy. Petitioner was sentenced to a dismissal, confinement

for two years, and forfeiture of all pay and allowances. The confinement was later reduced to eighteen months.

The Petitioner entered confinement on October 16, 2002 for a period of eighteen months. After computation of good-time credit, Petitioner's minimum release date was December 29, 2003 and his maximum release date was April 15, 2004.

After serving several months confinement, Petitioner applied for parole. On June 25, 2003, the Parole Board denied Petitioner's request for parole. Petitioner appealed the parole denial which was denied on September 8, 2003.

On December 29, 2003, Petitioner was placed in the MSR program. He was required to comply with the requirements of the MSR program to include the following: immediately go to his designated residence, report in person to the probation officer, remain within certain prescribed limits, "work diligently at a lawful occupation," and receive permission from his probation officer prior to changing his residence or place of employment. Among other "standard" conditions, Petitioner was required to "promptly and truthfully answer all inquiries" from the Air Force, his commander, or other officials. He was required not to associate with "persons of a bad or questionable reputation" or frequent certain locations. The standard MSR conditions also prohibited Petitioner from possessing firearms, required him to participate and make progress in a community-based sex offender treatment program, have no contact with the victim,

abstain from the use and possession of pornographic or sexually stimulating materials, not frequent adult bookstores, sex shops, topless bars, or other locations that act as a sexual stimulus and register as a sex offender.

On February 2, 2004, the Air Force Clemency and Parole Board (the Board) suspended Petitioner's MSR release based on reported violations of the imposed MSR conditions, contained in the Request for Warrant letter, dated February 2, 2004. As a result of the warrant letter, Petitioner was apprehended on or about February 2, 2004 and returned to the Naval Consolidated Brig, Miramar, CA, pending a formal decision from the Board regarding his MSR and confinement status. On May 1, 2004, a preliminary interview was conducted and a summary report was generated stating there was probable cause to believe the offenses occurred, again, based on information contained in the Request for Warrant letter, dated February 2, 2004.

On March 24, 2004, an MSR Hearing was conducted and a report was generated. Petitioner was afforded the opportunity to present evidence in his defense. Notably, the report contained a list of the alleged violations (2) and the specific conduct constituting the violations. The conduct identified appears to be based on the only evidence presented by the Government: a United States Parole Officer letter with an internet conversation log from an anonymous individual from Perverted Justice which was the same letter which served as a basis for the arrest warrant and subsequent investigation. The findings of facts

are based on this request for warrant letter and the fact that no solid evidence was presented at the violation hearing. In each case of alleged violations the fact that no solid evidence was produced to prove otherwise was dispositive. Petitioner denied both allegations and submitted evidence of not having access to a computer during the time period. No other witnesses testified and no other evidence was considered. The hearing summary included the allegations and how Petitioner responded. There was no transcript or audio recording of the hearing; only the MSR Hearing Report consisting of three pages.

On April 15, 2004, the Board formally revoked Petitioner's MSR release stating that violations had occurred. Further, the Board determined that his "street time," the time that Petitioner was released from confinement under MSR conditions, would not be credited toward his eighteen-month sentence to confinement. Even though the first reported MSR violation did not occur until January 11, 2004, the board declared that Petitioner's entire time under the MSR program—December 29, 2003 until February 2, 2004—would not be credited to his confinement term. Likewise, Petitioner was not awarded with his prior good time credit while in confinement.

On April 16, 2004, Petitioner petitioned the Court of Appeals for the Armed Forces (C.A.A.F.) in the nature of a writ of *habeas corpus*, seeking release from confinement. The court denied the petition on June 1, 2004. *See United States v. Seawell*, 60 M.J. 114 (C.A.A.F. 2004). Petitioner was released from

confinement 35 days after the original maximum release date of April 15, 2004.

On November 17, 2005, the Air Force Court of Criminal Appeals (A.F.C.C.A.) affirmed the findings and sentence as adjudged. App. 11a. On 16 November 2006, the C.A.A.F. granted review on three issues in Petitioner's case. On 16 July 2007, the C.A.A.F. certified an issue and remanded the case to A.F.C.C.A. App. 7a. On December 28, 2007, the A.F.C.C.A. affirmed the sentence. App. 2a. On August 5, 2008, the C.A.A.F. again granted review and summarily disposed of the case. App. 1a.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition because Petitioner was denied procedural due process protections at his MSR revocation hearing that he would have otherwise enjoyed at a parole revocation proceeding. The lower court's ruling in this case thus creates a split of authority among the federal circuits. *Compare Seawell*, 60 M.J. 114 *with United States v. Copley*, 978 F.2d 829, 835 (4th Cir. 1992) (indicating a convicted accused on supervised release should have the same due process protections before his release may be revoked as one on probation). Additionally, this Court should grant this petition because Petitioner was imprisoned longer than his approved sentence to confinement in violation of the Eighth Amendment.

I. The United States Court of Appeals for the Armed Forces' decision conflicts with other federal courts of appeal.

Servicemembers may obtain early release from their approved sentences to confinement in one of two ways: parole or through the Mandatory Supervised Release program (MSR). While inmates apply for parole, they do not for MSR. Rather, a parole and clemency board orders the inmate into the program. *Joint MSR Policy.* Thus, an inmate can avoid being paroled simply by not applying, but must enter the MSR under threat of criminal or administrative sanction. *Id.*, ¶ E-5.

When the Government seeks to revoke a servicemember's parole, it is required to conduct a violation hearing to determine whether the parolee has violated any conditions of parole and whether parole should be revoked. *See* Department of Defense Instruction (DoDI) 1325.7, *Administration of Military Correctional facilities and Clemency and Parole Authority*, ¶ 6.17.10 (July 17, 2001). App. 15a,16a. The Government is required to provide the parolee evidence on which a finding of the violation may be based. *Id.* at ¶ 6.17.10.10. The scope of the hearing may include examination of the evidence, relevant questioning of witnesses, pertinent statements as to the alleged violation and whether parole should be revoked. *Id.* at ¶ 6.17.10.11. The parolee is permitted to present witnesses and may cross-examine adverse witnesses. *Id.* at ¶ 6.17.10.12. However, a servicemember facing a MSR

revocation hearing does not enjoy the full due process protections of a parole violation hearing.

DoDI 1325.7, ¶ 6.20.6 states that a violation of MSR will be considered equivalent to a violation of the terms of parole and will be processed in accordance with DoDI 1325.7, ¶ 6.17.10 and ¶ 6.17.11. *See* DoDI 1325.7, ¶ 6.20.7. Paragraph 6.17.10 specifically lists the procedure and scope of a revocation hearing. App. 16a. If parole is revoked, paragraph 6.17.11 provides generally that credit shall be awarded with some delineated exceptions. App. 21a.

"[T]he due process clause of the fourteenth amendment imposes procedural...limits on the revocation of the conditional liberty created by probation." *United States v. Copley*, 978 F.2d 829, 835 (4th Cir. 1992), quoting *Black v. Romano*, 471 U.S. 606, 610 (1985) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, (1973); *Morrissey v. Brewer*, 408 U.S. 471, (1972)). The court further held that logic would extend this protection to revoke supervised release where the only difference between supervised release and probation is that the former follows a prison term and the latter is in lieu of a prison term. *Id.* The lower court in this case did not follow this logic.

A revocation hearing "must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation." *United States v. Stephenson*,

928 F.2d 728, 732 (6th Cir. 1991), citing *Morrissey v. Brewer*, 408 U.S. 471 (1972). A minimal procedural requirement includes "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." *Id.*

Where the appellant was on supervised release and based on allegations from probation officer faced a revocation hearing to determine whether appellant violated conditions, the court held "the record is scant on proof to support the findings of violations." *Id.* at 731. In *Stephenson*, there was testimony from the probation officer, the appellant's mother and the appellant and the court concluded, "[b]ecause of the lack of reliable evidence establishing Stephenson had either engaged in criminal conduct or used alcohol to excess and because the district court made no written statement explaining the evidence relied on or the reasons for revoking release, we find the district court abused its discretion." *Id.* at 733.

Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a "retraction justified by the considerations underlying our penal system." *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) (quoting *Price* v. *Johnston*, 334 U.S. 266, 285 (1948)). However, prisoners may claim the protections of the Due Process Clause. *Id.* at 556. "They may not be deprived of life, liberty, or property without due process of law." *Id. Haines* v. *Kerner*, 404 U.S. 519 (1972); *Wilwording* v. *Swenson*, 404 U.S. 249 (1971); *Screws v. United States*, 325 U.S. 91 (1945).

In *Wolff*, the petitioner challenged practices of disciplinary proceedings at the Nebraska Penal and Correctional Complex as being adverse to the Due Process clause of the Fourteenth Amendment. Part of the challenged practices occurred in cases of flagrant or serious misconduct, where the chief executive officer may order that a person's reduction of a person's good-time credit be forfeited or withheld. *Id.* at 546. Petitioner sought (1) restoration of good time; (2) submission of a plan by the prison authorities for a hearing procedure in connection with withholding and forfeiture of good time which complied with the requirements of due process; and (3) damages for the deprivation of civil rights resulting from the use of the allegedly unconstitutional procedures. *Id.* at 553.

As a starting point, this Honorable Court quickly dismissed the petitioner's assertion that the procedures for disciplining prison inmates for serious misconduct was a matter of policy, which raised no constitutional issue. *Id.* at 555. While noting that the Constitution does not guarantee good time credit, the Court determined that the State created a liberty interest embraced by the Fourteenth Amendment. *Id.* at 557. The Court held this liberty interest in good time credit entitled a prisoner to "minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Id.* The Court opined that a "person's liberty is equally protected, even when the liberty itself is a statutory creation of the State." *Id.* at 558.

"The presence of a large measure of discretion in a parole system...does not alter the fundamental due process limitation against capricious decisionmaking...A legislative grant of discretion does not amount to a license for arbitrary behavior." *Block v. Potter*, 631 F.2d 233 (3d Cir. 1980) (citing *Kent v. United States*, 383 U.S. 541, 553 (1966)). In *Block*, the appellant's application for parole was denied because "a person like Block who had enjoyed the social advantages of financial security, a college and post-graduate education, and professional employment, should be treated more harshly than the 'typical...parole applicant.'" *Id.* at 236. In determining the issues, the Third Circuit Court of Appeals explained that "weighing individual characteristics and propensities to make individual judgments about relative culpability is a sentencing function, within the sole province of the judiciary." *Id.* at 239. In that case, when the Board singled out Block for harsher treatment solely because of his individual background, it was in effect, passing sentence upon him for the second time. The Third Circuit determined that the Board applied standards that were divorced from the policy and purpose of parole, abusing its discretion and violating Block's right to due process of law. *Id.* at 240.

In the present, the Air Force Parole and Clemency Board has no procedures or protections for the revocation of Petitioner's street time for failure to comply with MSR. In fact, Air Force Instruction 31-205, *The Air Force Corrections System*, dated April 7, 2004, provides:

> AFC&PB proceedings are not open to the public and the Board does not permit personal appearances by or on behalf of the inmate, victims, or other interested individuals. The Board considers any written, audio, or video material sent by or on behalf of the inmate, victims, witnesses and other interested individuals.

Additionally, Petitioner's good time was also revoked. According to DoDI 1325.7:

> E26.1.1. Good conduct time shall be accorded each prisoner serving a sentence(s) imposed by a court-martial or other military tribunal for a definite term or terms of confinement. It shall not be given to prisoners who have a life sentence. Good conduct time shall be credited monthly with a deduction from the term of sentence(s) beginning with the day that the sentence begins. Good conduct time shall be credited at the rates described below:
>
> E26.1.3. A parole or probation violator, on return to confinement, shall earn good conduct time at the rate applicable to the sentence in effect at the time of violation of parole or probation.

In this case, Petitioner's MSR was revoked, his street time credit taken away, his good time credit taken away, and his maximum release date extended. There is no record to even establish that the Board's decision was warranted or based upon

any evidentiary standard. Certainly, there is no assurance that its decision was not arbitrary, capricious, or erroneous. And, there is nothing in the record to indicate that any procedure was enacted to ensure fair consideration of Petitioner's earned good time. Although the revocation letter contains the requisite language, it lacks any substance as required.

Indeed, this Court has described the revocation of parole alone as "inflict[ing] a 'grievous loss' on the parolee and often on others." *Wolff,* 418 U.S. at 560 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). This case involves the revocation of MSR and, as such, is entitled at least to minimum due process protections. While Petitioner was provided with certain procedural niceties for his MSR Revocation hearing, no procedural due process was afforded to Petitioner in regards to his revocation of good time, as in *Wolff,* or his street time credit. The Board merely considered second hand information in the form of the original letter used to issue an arrest warrant, subject to the probable cause standard. The final finding of fact was made without reference to any other evidence; except to say the conduct had occurred. The conclusory statements as a result of repeating the allegations are absent of any underlying facts or evidence in support. This is inconsistent with the holding that supervised release revocation requires more than a probable cause determination and requires reliable evidence and a written statement explaining the evidence relied upon and the reasons for revocation.

In this case, like *Wolff,* no procedural due process was afforded to Petitioner in regards to his revocation of credit. Generally, a prisoner whose parole is revoked shall receive credit for time spent on parole unless (1) the parolee commits and pleads guilty to or is convicted of a new offense punishable by a term of imprisonment or (2) if the Board finds that the parolee was not in material compliance with the conditions of parole. DoDI 1325.7, ¶ 6.17.11. App. 21a. It appears the Board elected the second exception for the revocation of good time credit but the due process requirements to determine the violation in fact occurred are lacking. The reasoning for finding Petitioner was not in material compliance was that the conduct occurred without affording any due process considerations, including witnesses, evidence and/or statements, except the original arrest warrant.

As such, servicemembers have less protections than other inmates sentenced to supervised release; an outcome which is in contravention with other lower federal courts. By being able to revoke earned credit against an adjudged sentence, the armed forces' supervised release program results in a servicemember serving a longer sentence than that adjudged. The Board's action violated the Fifth Amendment.

II. Petitioner was confined longer than authorized under his approved sentence.

In *United States v. Pena*, 64 M.J. 259 (C.A.A.F. 2007), the appellant challenged the authority of the DoD to establish the MSR program in the absence of express statutory authority. The C.A.A.F. noted that the scope of its review did not extend to supervision of all aspects of the confinement and release process. *Id.* at 264. Rather, its review was limited to the impact of such conditions on the findings and the sentence. *Id.*

The C.A.A.F. specifically addressed MSR's effect upon the adjudged sentence, noting the conditions of mandatory release did have some impact upon the appellant. *Id.* at 266. However, the court ruled that the participation in MSR program itself did not increase the punishment adjudged by the court-martial. In particular, the court stated "we do not disregard the possibility that the Mandatory Supervised Release program could be imposed in a manner that increases the punishment above the punishment adjudged by the court-martial." *Id.*

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII; *see also* Article 55, UCMJ, 10 U.S.C. § 855 (2000). This Honorable Court has stated that punishments violate the Eighth Amendment when they "are incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involve the unnecessary and wanton infliction of pain." *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976) (internal quotation marks and citations omitted).

"Since any confinement is the deprivation of personal freedom for a specified period, it is axiomatic that a confined person should be released once the confinement has been served." *United States v. Mansfield*, 33 M.J. 972, 995 (A.F.C.M.R. 1991) (citing *United States v. Hilt*, 18 M.J. 604 (A.F.C.M.R. 1984). If an accused is held in confinement beyond his required release date, an accused merits "meaningful relief" with respect to the remainder of the sentence. *Hilt*, 18 M.J. at 604 (citing *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983)). *See United States v. Weber*, 56 M.J. 736, 738 (C.G. Ct. Crim. App. 2002) (citing *United States v. Keith*, 36 M.J. 518, 519 (A.C.M.R. 1992)).

In Petitioner's case, based on allegations of noncompliance with his conditions for MSR, Petitioner was placed back in confinement and was held 35 days beyond his maximum release date, increasing his sentence in violation of the Eighth Amendment.

CONCLUSION

The Board unlawfully modified and increased the severity of the Petitioner's approved sentence by imposing the MSR conditions upon him, revoking his previously earned good time and street time without any meaningful due process considerations and keeping him beyond his maximum release date, subjecting him to a longer sentence than what was adjudged. The Board's actions violated the Fifth and Eighth Amendment. For the foregoing reasons,

Petitioner respectfully requests that this Honorable Court grant his petition for a writ of certiorari.

Respectfully submitted,

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UNITED STATES, Appellee

v.

Doncosta E. SEAWELL, Cadet

U.S. Air Force, Appellant

UNITED STATES
COURT OF APPEALS FOR
THE ARMED FORCES

2008 CAAF Lexis 921

August 5, 2008, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

OPINION:

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, said petition is hereby granted, and the decision of the United States Air Force Court of Criminal Appeals is affirmed.

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS
UNITED STATES

v.

Cadet DONCOSTA E. SEAWELL
United States Air Force
ACM 35531 (f rev)

December 28, 2007, Decided

COUNSEL: For Appellant: Colonel Beverly B. Knott, Colonel Carlos L McDade, Major Terry L. McElyea, Capt James M. Winner, Captain Anthony D. Ortiz, and Frank J. Spinner, Esq.

For the United States: Colonel Gerald R. Bruce, Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs , Lieutenant Colonel Gary F. Spencer, Major Matthew S. Ward, Major John C. Johnson, and Major Brendon K. Tukey.

JUDGES: Before FRANCIS, SOYBEL and BRAND, Appellate Military Judges.

OPINION BY: Per Curiam

OPINION

OPINION OF THE COURT

Consistent with his pleas, the appellant was convicted of forcible sodomy, in violation of Article 125, UCMJ, 10 U.S.C. § 925. His approved sentence consists of a dismissal, confinement for 18 months, and total forfeitures.

This case is before our Court for the second time. In *United States v Seawell*, 63 M.J. 260 (A.F. Ct. Crim. App. 2005) (unpub. op.), we affirmed the findings and sentence. On appeal, our superior court affirmed the findings, but set aside the sentence and returned the record to the Judge Advocate General of the Air Force for remand to our Court.

The issue specified for consideration with respect to the sentence is: WHETHER THE DECISION TO DISAPPROVE TIME SERVED ON MANDATORY SUPERVISED RELEASE AND IMPRISON APPELLANT BEYOND HIS MAXIMUM RELEASE DATE INCREASED APPELLANT'S PUNISHMENT ABOVE THE SENTENCE APPROVED BY THE CONVENING AUTHORITY. SEE UNITED STATES V. PENA, 64 M.J. 259 (C.A.A.F. 2007). [1]

Background

The appellant was sentenced, on 16 October 2002, to a dismissal, confinement for 2 years, and total forfeitures. The convening authority, in accordance with the pretrial agreement, reduced the approved confinement to 18 months. On 25 June

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[1] Although through his brief, the appellant has raised three additional issues, we will limit our decision to the issue specified. See Article 67(e), UCMJ, 10 U.S.C. § 867(e).

2003, the appellant was denied parole. He was advised, on 3 September 2003, that he would be placed in the Mandatory Supervised Release (MSR) program on his minimum release date, 29 December 2003. On 29 December 2003, the appellant was released on MSR until his maximum release date of 15 April 2004.

On 2 February 2004, authorities were notified of alleged parole (MSR)[2] violations occurring on 11 and 14 January 2004. The appellant's supervised release was suspended as of that date. On 14 April 2004, after substantial compliance with governing regulations,[3] the Air Force Clemency and Parole Board (AFC&PB); revoked the appellant's parole and denied him administrative credit for his "street time." The issue of whether the appellant would receive credit for his "street time"[4] was specifically addressed by the AFC&PB. The board determined that because the appellant violated the conditions of the MSR program within two weeks of release, the appellant was never "in material compliance with the conditions" of MSR during the entire period of his time on supervision. *See* DODI 1325.7, PP 6.20.6, 6.17.11.2. The appellant's maximum release date was adjusted by 35 days. [5]

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[2] In execution, MSR is virtually identical to parole. United States v. Pena, 61 M.J. 776, 780 (A.F. Ct. Crim. App. 2005), aff'd, 64 M.J. 259 (C.A.A.F. 2007)

[3] DODI 1325.7, Administration of Military Correctional Facilities and Clemency and Parole Authority (21 Jul 2001); AFI 31-205, The Air Force Corrections System (9 Apr 2001); see also Pena, 61 M.J. 776.

[4] 29 Dec 03 - 2 Feb 04.

[5] The time he spent on MSR.

Discussion

The issue whether the appellant's sentence has been unlawfully increased is an issue we review de novo. *United States v. Pena*, 64 M.J. 259, 265 (C.A.A.F. 2007). Generally, the administrative consequences of a sentence, such as early release programs, do not constitute punishment. *Id.* There is a possibility "that the MSR program could be imposed in a manner that increases the punishment above the punishment adjudged by a court-martial. The burden, however, is on the party challenging the conditions to demonstrate there has been an increase above the punishment of confinement imposed at trial." *Id.* at 266.

In *Pena*, the appellant was predominantly complaining about the conditions[6] of his parole (MSR) whereas in the case sub judice, the appellant complains that the decision to not award credit for "street time" and to re-imprison the appellant, thus creating an adjustment in his maximum release date, unlawfully increased his punishment. The appellant has failed, even minimally, to demonstrate how being released from confinement on parole; and then, after an administrative hearing, being re-confined upon findings of violations of that parole; and being required to serve his approved sentence equates to an unlawful increase in his sentence.

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[6] Conditions that were far more onerous than those imposed upon Cadet Seawell.

The appellant was required to serve his sentence without receiving credit, as determined by the AFC&PB, in accordance with procedures, for the time he spent on the "street" on MSR. Requiring the appellant to serve out his sentence merely resulted in an adjusted maximum release date, not an increase in punishment. He spent no more time in jail than the total of his approved sentence.

Conclusion

The previously approved and affirmed findings, and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

UNITED STATES, Appellee

v.

Doncosta E. SEAWELL, Cadet

U.S. Air Force, Appellant

UNITED STATES
COURT OF APPEALS FOR
THE ARMED FORCES

65 M.J. 302

July 16, 2007, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

JUDGES: RYAN, Judge (concurring in the result)

OPINION

On further consideration of the granted issues, 64 M.J. 317 (C.A.A.F. 2006), it is ordered that the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed as to the findings, but set aside as to the sentence. The record is returned to the Judge Advocate General of the Air Force for remand to the Court of Criminal Appeals for consideration of the following issue with respect to the sentence:

WHETHER THE DECISION TO DISAPPROVE TIME SERVED ON MANDATORY SUPERVISED

RELEASE AND IMPRISON APPELLANT BEYOND HIS MAXIMUM RELEASE DATE INCREASED APPELLANT'S PUNISHMENT ABOVE THE SENTENCE APPROVED BY THE CONVENING AUTHORITY. *SEE UNITED STATES v. PENA*, 64 M.J. 259 (C.A.A.F. 2007).

Thereafter, Article 67(b), Uniform Code of Military Justice, 10 U.S.C. § 867(b)(2000), shall apply.

CONCUR BY: RYAN

RYAN, Judge (concurring in the result):

The remand in this case is based on *United States v. Pena*, 64 M.J. 259 (C.A.A.F. 2007), a case in which I did not participate. There is a potential reading of the *Pena* decision that gives me pause with respect to the threshold question of jurisdiction.

Not so long ago the Supreme Court reaffirmed a fundamental principle of law: this Court's jurisdiction is "strictly circumscribed" to "act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." *Clinton v. Goldsmith*, 526 U.S. 529, 531, 534, 119 S. Ct. 1538, 143 L. Ed. 2d 720 (1999) (citing Article 67(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(c) (2000)). In addressing the limits of this Court's jurisdiction, the Supreme Court further recognized the power of this Court "to compel adherence to its own judgment" when a "military authority attempted to alter a judgment by revising a court-martial finding or

sentence to increase the punishment, contrary to the specific provisions of the UCMJ." *Goldsmith*, 526 U.S. at 536.

In light of this precedent, it is unclear to me whether and how this Court has jurisdiction under Article 67(c), UCMJ, to take action with regard to something that is not itself part of the findings or adjudged sentence or an alteration of the judgment. *Goldsmith*, 526 U.S. at 536. On the one hand, *Pena* appears to recognize this limitation. 64 M.J. at 266 (focusing on whether there is "an increase in the punishment of confinement adjudged by the court-martial"). On the other hand, *Pena* also suggests that this Court has jurisdiction to review "post-trial confinement and release conditions on direct appeal[,] . . . limited to the impact of such conditions on the findings and the sentence." 64 M.J. at 264. I am concerned that this latter statement may be read to sweep more broadly than our legislative mandate.

A brief review of the Mandatory Supervised Release Program (MSRP) that Pena complained of heightens the reservation I have about the breadth of this statement. Pena complained that:

> he was unable to stop in Colorado to ship his household goods to Illinois, that he incurred a ten dollar per week expenditure for transportation to the sex offender treatment program, that he was required to attend Alcoholic Anonymous classes three times a week at night and sex offender treatment classes once a week during the day, that he had various other appointments and a requirement to give a urine sample on short

> notice every two weeks, and that the conditions of mandatory supervision left him unable to find work to support his family.
> *Id.*

I do not see how these complaints involve an alteration of the adjudged sentence. This Court held that Pena failed to show that his "burdens [were] such that they resulted in an increase in the punishment of confinement adjudged by the court-martial." *Id.* at 266. But that statement by this Court could be read as support for the proposition that determining whether the MSRP results in an increase in the punishment of confinement is not limited to an actual alteration of the adjudged sentence, but includes assessments "about the personal, psychological, economic, and family impact" of a MSRP on the party "appealing the sentence." *Id.* It is unclear to me how social, family, and psychological issues constitute an alteration of an adjudged sentence. It is also unclear to me how we have the power to review collateral consequences of the MSRP, a program administered by executive branch officials on the Clemency and Parole Board. *See Goldsmith*, 526 U.S. at 536.

It remains to be seen whether my reservation is warranted. Regardless, a summary remand with no briefing on the jurisdictional issue is not the proper vehicle to address the issue. Consequently, I join the Court's disposition here today. But I am open to revisiting the issue, as necessary, in an appropriate case.

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS
UNITED STATES

v.

Cadet DONCOSTA E. SEAWELL
United States Air Force
ACM 35531

November 17, 2005, Decided

COUNSEL: For Appellant: Colonel Beverly B. Knott, Colonel Carlos L McDade, Major Terry L. McElyea, Capt James M. Winner and Frank J. Spinner, Esq.

For the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs and Major John C. Johnson.

JUDGES: Before STONE, MATHEWS, and JACOBSON, Appellate Military Judges.

OPINION BY: MATTHEWS

OPINION

OPINION OF THE COURT

MATHEWS, Judge:

The appellant was convicted, in accordance with his pleas, of forcible sodomy, in violation of Article 125, UCMJ, 10 U.S.C. § 925. He was sentenced by a military judge sitting as a general court-martial to dismissal from the service, confinement for 2 years, and forfeiture of all pay and allowances. Pursuant to a pretrial plea agreement, the convening authority reduced the appellant's term of confinement to 18 months, but otherwise approved the sentence as adjudged.

The facts relevant to the disposition of this appeal are as follows: On 28 December 2001, while visiting Los Angeles, California, the appellant went to the home of EH, a former high-school classmate. EH is confined to a wheelchair, suffering from a severe form of cerebral palsy. When EH opened the door, the appellant went into her home, refusing her entreaties to leave. He then proceeded to pull her from her wheelchair and, ignoring her repeated pleas to stop, pinned her down and repeatedly anally sodomized her. The force of his assault was sufficient to cause persistent, visible bleeding, and left EH in pain and in shock. When he finished, the appellant patted EH on the head, saying "Sorry it had to be like this." He put her back in her wheelchair, with her pants still pulled down around her ankles, and left.

On appeal, he urges us to find that the convening authority in his case, the Superintendent of the United States Air Force Academy (USAFA), was "disqualified . . . because he was under intense scrutiny" regarding sexual assault allegations

involving USAFA cadets. We review claims concerning disqualification of the convening authority de novo. *United States v. Taylor*, 60 M.J. 190, 194 (C.A.A.F. 2004). The appellant bears the burden of making a prima facie case for disqualification. *Id.* (citing *United States v. Wansley*, 46 M.J. 335, 337 (C.A.A.F. 1997)).

We conclude that the appellant has failed to meet his burden. The documents provided by the appellant's counsel show that the convening authority "was scheduled to retire" and that his pending retirement was a matter of public record prior to taking action on the appellant's case. Thus, we find that - contrary to the appellant's claims - the convening authority did not permit concerns about his career to influence his action. Article 66(c), UCMJ, 10 U.S.C. § 866(c). Further, we find that the appellant waived any error related to the "immense," "national" scrutiny of the Academy by failing to raise it prior to the convening authority's action. *See United States v. Jeter*, 35 M.J. 442, 447 (C.M.A. 1992).

Appellant also points to an e-mail sent by the convening authority, in his capacity as the USAFA Superintendent, suggesting that the Air Force and the USAFA have "zero tolerance for sexual assault." As noted by our superior appellate court, the phrase "zero tolerance" may be interpreted in many ways, ranging from benign to prejudicial. *United States v. Simpson*, 58 M.J. 368, 375 (C.A.A.F. 2003). A reminder that the service will not overlook some forms of misconduct is in itself innocuous. *Id.* We

conclude that the convening authority's e-mail was such a reminder and not an endorsement of any particular result.

Viewed in context with its caution that news reports "typically don't reflect all the factors that must be considered in judging whether these cases have been handled fairly," as well as references to the need for justice, "appropriate" discipline, and the importance of fairness to both parties, the e-mail falls clearly on the benign side of the spectrum. Moreover, we note that the convening authority the appellant now complains was biased, is the same one who signed the appellant's pretrial plea agreement. It is difficult to envision how the appellant - who faced the possibility of confinement for life, without parole - could realistically have expected a more lenient deal.

We have considered the appellant's remaining assignments of error and resolve them adversely. *See* United States v. Pena, 61 M.J. 776, (A.F. Ct. Crim. App. 15 September 2005). The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

Department of Defense Instruction

NUMBER 1325.7
July 17, 2001
Incorporating Change 1, June 10, 2003

USD(P&R)

SUBJECT: Administration of Military Correctional Facilities and Clemency and Parole Authority

References:

(a) DoD Instruction 1325.7, "Administration of Military Correctional Facilities and Clemency and Parole Authority," December 17, 1999(hereby canceled)
(b) DoD Directive 1325.4, "Confinement of Military Prisoners and Administration of Military Correctional Programs and Facilities," September 28, 1999
(c) DoD Directive 1300.17, "Accommodation of Religious Practices Within the Military Services," February 3, 1988
(d) Title 10, United States Code
(e) through (k), see enclosure 1

Department of Defense Instruction 1325.7, *Administration of Military Correctional facilities and Clemency and Parole Authority*, ¶ 6.17.10 (July 17, 2001):

> 6.17.10.1. When a prisoner's parole has been suspended, a preliminary interview shall be held to determine whether probable cause exists to establish that a parolee violated a condition of parole. If, however, the parolee absconds parole or pleads guilty to or is convicted of an offense that is punishable by imprisonment, the parolee's absconding, the guilty plea or conviction shall suffice as probable cause and a preliminary interview may be waived by the Clemency and Parole Board of the prisoner's Service
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> 6.17.10.2. The preliminary interview shall normally be conducted by a neutral and detached officer at or near the place of the alleged parole violation.
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> 6.17.10.3. The parolee shall be provided written notice of the preliminary interview, including the purpose of that interview.
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> 6.17.10.4. The parolee shall be given an opportunity to inspect the evidence on which the revocation is based and an

opportunity to be heard and to present relevant matters. Witnesses called by the parolee shall be at no expense to the Government.

6.17.10.5. The parolee may be represented at the preliminary interview by an attorney at no expense to the Government. The role of an attorney at a preliminary interview shall be limited in accordance with subparagraph 6.17.10.13., below.

6.17.10.6. When the officer conducting the preliminary interview finds probable cause to believe that the parolee violated any condition of parole, the Board may order a parole violation hearing. The violation hearing shall be conducted before a prisoner's parole is revoked. The purpose of the violation hearing is to determine whether the parolee has violated any condition of parole and, if so, whether the parole should be revoked.

6.17.10.7. The parole violation hearing shall normally be held at or near the place of the alleged violation. When the parolee has been returned to a military confinement facility or is confined by civil authorities, the parole violation hearing may be held at the place of confinement.

6.17.10.8. A Clemency and Parole Board of the inmate's Military Department shall appoint a hearing officer or panel to conduct a parole violation hearing. The hearing officer or panel shall be neutral and need not be, or include, a judicial officer or attorney.

6.17.10.9. The parolee and all victims indicating a desire to be notified shall be given written notice of the violation hearing. The notice to the parolee shall inform the parolee of the alleged violation, the purpose of the parole violation hearing, the evidence on which the parole violation hearing is based, the parolee's rights at the parole violation hearing, and the options available to the Clemency and Parole Board.

6.17.10.10. Evidence on which a finding of violation may be based shall be disclosed to the parolee at least 10 days before the parole violation hearing. If evidence supporting a parole violation is discovered subsequent to the hearing, the parolee will be given 10 days to respond in writing to the new evidence.

6.17.10.11. The scope of a parole violation hearing shall be limited to the examination of evidence of an alleged parole violation, relevant questioning of

witnesses, pertinent statements as to an alleged parole violation, and whether the parole should be revoked.

6.17.10.12. The parolee may present witnesses and documentary evidence, at no expense to the Government, on his or her behalf and may cross-examine adverse witnesses subject to limitations imposed by the hearing officer or panel for good cause. The hearing officer or panel may limit or exclude any irrelevant or repetitious witness, statement, question, or documentary evidence.

6.17.10.13. The parolee may be represented at a parole violation hearing by an attorney or representative of his or her choice at no cost to the Government. When requested by the parolee, a military attorney shall be provided; however, the parolee has no right to a military attorney of his or her choice. The role of any representative or attorney shall be limited to the examination of witnesses, presentation of evidence, and the offering of a statement on the parolee's behalf as to whether parole should be revoked. Challenges to the parole violation hearing proceedings shall not be permitted. The hearing officer or panel may deny, for good cause, a

parolee's choice of a nonattorney representative.

6.17.10.14. Parole may be revoked based on a finding that a parolee has violated a condition of parole by failure to pay a fine or make restitution only if the parolee refused to pay the fine or make restitution when the parolee had sufficient resources; or the parolee failed to make sufficient bona fide efforts to obtain employment, borrow money, or legally acquire funds with which to pay the fine or make restitution. If he parolee could not pay the fine or make restitution, despite sufficient bona fide efforts to acquire the resources to do so, parole may be revoked only if no alternative disposition exists that will adequately serve the need for good order and discipline within the Armed Services and the correctional treatment of the parolee.

6.17.10.15. A Clemency and Parole Board shall take final action on the findings and recommendations of the officer or panel conducting a parole violation hearing.

Department of Defense Instruction 1325.7, *Administration of Military Correctional facilities and Clemency and Parole Authority*, ¶ 6.17.11 (July 17, 2001):

> 6.17.11. A prisoner whose parole is revoked shall receive credit for time spent on parole except as follows:
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> 6.17.11.1. If, after being released on parole, the parolee commits and pleads guilty to or is convicted of a new offense that is punishable by a term of imprisonment, forfeiture of the time from the date of release to the date of suspension or revocation of that parole as a result of that new offense may be ordered by the Clemency and Parole Board and such forfeited time shall not be credited to service of the sentence. An actual term of confinement need not have been imposed for such conviction if the statute under which the parolee was convicted permits the trial court to impose any term of confinement. If such conviction occurs subsequent to a parole violation hearing, a Clemency and Parole Board may reconsider the forfeiture of time served on parole or other disposition, as appropriate.
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> 6.17.11.2. If the Clemency and Parole Board finds that a parolee refused or failed to respond to any reasonable

request, order, or summons of a Clemency and Parole Board or any agent thereof, including the assigned probation officer, or if a Clemency and Parole Board finds that the parolee was not in material compliance with the conditions of parole, a Clemency and Parole Board may order the forfeiture of time from date of the refusal, failure or violation to the date of revocation or return to custody to serve the military sentence. The length of time between release on parole and the refusal, failure or violation, and the nature and seriousness of the misconduct shall be considered in determining whether a parolee was ever in material compliance with the parole conditions.

6.17.11.3. Computation of any sentence to be served shall be done in accordance with applicable Service regulations. Prisoners who have been transferred to the FBOP, however, shall have their remaining sentences and related issues computed according to the FBOP regulations when parole is suspended or revoked.